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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PEDRO MARTINEZ, Defendant and Appellant.	B262799 (Los Angeles County Super. Ct. No. BA404685)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappé, Judge. Affirmed in part and reversed in part with directions.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Pedro Martinez appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a)) and attempted premeditated murder (*id.*, §§ 187, subd. (a), 664). The jury found true the allegations the crimes were committed for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)), and in the commission of the crimes, a principal discharged a handgun, causing great bodily injury and death (*id.*, § 12022.53, subds. (d), (e)(1)). The jury also found defendant guilty of misdemeanor vandalism (*id.*, § 594, subd. (a)), committed for the benefit of a criminal street gang. The trial court sentenced defendant pursuant to the three strikes law (*id.*, §§ 667, subds. (b)-(i), 1170.12) to state prison for a total term of 100 years to life.

On appeal, defendant contends the trial court erred in instructing the jury it could find him guilty of attempted murder based on a "kill zone" theory. He also contends the trial court erred in sentencing him under the three strikes law, in that he never admitted, and the trial court never found, he suffered a prior strike conviction. We conclude the court did not err in instructing the jury as to the kill zone theory with respect to the attempted premeditated murder of Santos Baquiax. However, the trial court failed to make a finding as to the prior strike conviction and the matter must be remanded for resentencing.

TESTIMONY AT TRIAL

At about 6:20 p.m. on November 4, 2012, Hipolito Acosta, Andres Ordonez and Santos Baquiax were in the parking lot of

the Principe de Paz Church, located at the corner of Beverly Boulevard and Reno Street in Los Angeles, preparing food to serve to the congregation. They heard the sound of glass shattering outside the parking lot. Acosta went out to investigate, followed by Ordonez and Baquiax.

Acosta saw Janeth Lopez spray painting graffiti on the wall of the church. He asked what she was doing, and she told him to "fuck off." She ran at Acosta and hit him hard on the arm with the spray paint can, making him fall to his knees. Lopez began hitting Acosta, who covered his face to protect it from the blows. When Ordonez and Baquiax came out from the parking lot, they saw Lopez on top of Acosta, hitting him in the head with the spray paint can. They moved toward Acosta to assist him.

Defendant got out of a car parked nearby and pulled a gun from his waistband. He pointed the gun at Ordonez and Baquiax and fired three to five shots. Ordonez was hit in the chest and fell to the ground. Baquiax started to duck when the shooting began. He was hit in the shoulder and also fell to the ground. Defendant and Lopez got into the car. Ivy Navarette, who was in the driver's seat, drove the car away.[1]

Ordonez died of the gunshot wound to his chest. Baquiax was taken to the hospital and treated for his gunshot wound.

The police identified Lopez from fingerprints and DNA on the spray paint can. They identified Navarette from DNA left on a beer bottle at the scene. Cell phone, graffiti and other evidence linked defendant to Lopez and Navarette, and Baquiax identified defendant as the shooter.

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[1] Lopez and Navarette were codefendants below. They are not parties to this appeal.

Defendant and Lopez were members of the Rockwood Street gang, and Navarette was a gang associate. The Rockwood Street gang is an enemy of the Temple Street gang, in whose territory the Principe de Paz Church was located. The graffiti on the church included the letters "R.W.S.T.," with the "T" crossed out. This showed Rockwood Street gang members were not afraid of the Temple Street gang, and it also showed disrespect toward Temple Street. Both the posting of the graffiti and the shootings benefited the Rockwood Street gang by showing a position of strength to its enemies and sending a message that no one should interfere with the gang.

DISCUSSION

A. *Instruction on the "Kill Zone"*

1. *Proceedings Below*

The jury here was given the following instruction on attempted murder pursuant to CALCRIM No. 600:

"The defendants are charged in Counts Two and Three with Attempted Murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Santos Baquiax

and/or Hipolito Acosta[2], the People must prove that the defendant not only intended to kill Andres Ordonez, but also either intended to kill Santos Baquiax and Hipolito Acosta or everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Santos Baquiax and Hipolito Acosta by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Santos [Baquiax] and Hipolito Acosta."

During deliberations, the jury sent the trial court two requests related to the kill zone concept. The first was to "clarify in [CALCRIM No.] 600 what determines the 'kill zone.'" The court responded that the answer was contained in the instruction itself, but it told the jury it would allow the lawyers to briefly argue the matter if that answer was not satisfactory. The jury then requested that the court "allow the lawyers to briefly argue [CALCRIM No.] 600 specifically in regards to what determines the kill zone."

It was agreed that counsel would be given time for additional argument on the issue. The prosecutor reiterated that attempted murder requires the specific intent to kill but explained that defendant could have had the specific intent to kill Ordonez or "a specific intent to kill everybody within a specific area. And that's where the kill zone comes in. Mr. Acosta wasn't struck. However, there are three shots that are fired. There are three individuals that are out there. And so my argument to you

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2 The jury deadlocked on the charge of attempted murder of Acosta, and the court declared a mistrial as to that charge. The court dismissed the charge at the sentencing hearing.

is he intended to kill everybody who was out there that night. He just didn't strike Mr. Acosta."

Defendant's counsel focused on evidence that Ordonez and Baquiax were together and not near Acosta when they were shot, so "[t]hey were within [one] zone," while Acosta was in another. Acosta could not have been an intended victim because he was not in the "zone of danger, the zone of harm." "Because he was closest to [defendant's] car. He wasn't running. He was not a moving target. He was standing still," counsel argued, "[i]f the shooter wanted to hit Mr. Acosta he could have." Counsel urged the jury to "look at those facts to determine if the kill zone even applies in this case and who and where the boundaries lie."

2. *Standard of Review*

The trial court has the duty to instruct the jury "'on the general principles of law relevant to the issues raised by the evidence.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) The trial court also "'has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues."'" (*People v. Alexander* (2010) 49 Cal.4th 846, 920.) "In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in

a way' that violates the Constitution.'" [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 831.)[3]

Where a jury has been instructed erroneously on a factual theory unsupported by substantial evidence, the error is one of state law "subject to the reasonable probability standard of harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836-836 . . . ." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [reversal is not required "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory"]; accord, *People v. McCloud* (2012) 211 Cal.App.4th 788, 803-804 [applying same standard].)[4]

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[3] Although defendant failed to object to the "kill zone" instruction, we have repeatedly stated that we review any claim of instructional error that affects a defendant's substantial rights whether or not trial counsel objected. (Pen. Code, § 1259 ["[t]he appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7.) We can only determine if defendant's substantial rights were affected by determining whether the instruction was given in error and, if so, whether he was prejudiced thereby. We therefore must review the merits of his claim of instructional error.

[4] Defendant erroneously contends that improper instruction of the jury on a kill zone theory was an error of constitutional dimension, as it diminished the standard of proving beyond a reasonable doubt that he possessed the specific intent to kill the intended victim, an essential element of attempted murder, requiring application of the *Chapman* standard: whether the

3. *Instruction on the "Kill Zone" Theory of Attempted Premeditated Murder*

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) "Implied malice—a conscious disregard for life—suffices for murder but not attempted murder." (*People v. Stone* (2009) 46 Cal.4th 131, 139-140.) While the doctrine of transferred intent is applicable to prove murder, it cannot be invoked to prove the requisite intent for attempted premeditated murder. (*People v. Bland* (2002) 28 Cal.4th 313, 328.) As the court explained in *Bland*: "Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. . . . Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Ibid.*)

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state has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The *Chapman* standard applies where the jury has been instructed on a legally inadequate theory, one which is contrary to the law, as opposed to a factually inadequate theory, one unsupported by the evidence, as arguably occurred here. (*People v. Brown* (2012) 210 Cal.App.4th 1, 12-13; see also *People v. Guiton*, *supra*, 4 Cal.4th at p. 1128.)

Under limited circumstances, a defendant who targets a specific person by firing indiscriminately at a crowd may nonetheless be convicted of attempted murder if the evidence shows he intended to kill everyone in the targeted victim's vicinity in order to get at the original intended victim. In *Bland*, the court articulated the kill zone theory of attempted murder, explaining: "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*People v. Bland*, *supra*, 28 Cal.4th at pp. 329-330.)

The court gave as examples of a kill zone the situation where someone places a bomb on a commercial plane intending to harm a primary target on the plane by killing all passengers on the plane or someone attacks a group of people using "'automatic weapon fire or an explosive device devastating enough to kill everyone in the group.'" (*People v. Bland*, *supra*, 28 Cal.4th at p. 330.) In these examples, "'[t]he defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'" (*Ibid*.) In *Bland*, the court found that where the defendant and a second shooter fired a flurry of bullets at a fleeing car in order to kill the driver, injuring two passengers, the evidence "virtually compels" an inference the defendant created a kill zone that would support attempted

murder convictions as to both passengers. (*Id*. at pp. 330-331, 333.)

In *People v. Campos* (2007) 156 Cal.App.4th 1228, 1244, the defendant drove to within four or five feet of a car with a driver and two passengers, and "sprayed the car with nearly a dozen bullets, from close range." The court found sufficient evidence to support attempted premeditated murder charges as to the passengers on a "kill zone" theory based on the intent of the defendant to kill everyone inside the car in order to kill the driver. (*Ibid*.)

Defendant relies on *People v. McCloud*, *supra*, 211 Cal.App.4th 788, for the proposition that "when a defendant uses a handgun to fire a few shots it is error to instruct the jury on the kill zone theory." In *McCloud*, the defendants "fired 10 shots from a semiautomatic handgun at a party at which over 400 people were present," striking three victims, two of whom died. (*Id*. at pp. 790-791.) They were charged with 46 counts of attempted murder. (*Id*. at p. 792.)

In finding the kill zone theory did not apply, the court explained the theory "does *not* apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual. Rather, the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*.

The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within that area. In effect, the defendant reasons that he cannot miss his intended target if he kills *everyone* in the area in which the target is located." (*People v. McCloud*, *supra*, 211 Cal.App.4th at p. 798.) The court found no evidence the defendants intended to kill 46 people with only 10 bullets. (*Id*. at pp. 799-800.)

The trial court did not err in giving the kill zone instruction in this case. The court clearly explained the prosecution's kill zone theory was centered on Ordonez and the jury could not find the requisite intent unless it found defendant intended to kill Ordonez and everyone in the kill zone around him. Baquiax was standing immediately next to Ordonez, well within the zone of danger described by *Bland*. There was substantial evidence defendant tried to kill his primary target Ordonez by firing several shots at the immediate area where Ordonez and Baquiax were standing intending to kill anyone in that area to ensure Ordonez was killed. There is no magic number of bullets which need to be fired to support a kill zone instruction; *McCloud* merely counsels that logically the theory cannot be used to support attempted murder counts based on more victims than bullets. Given that defendant fired anywhere from three to five bullets into the area where Ordonez and Baquiax were standing, it was not error to give the instruction.

Defendant nonetheless argues that the instruction was erroneous because it allowed the jury to find attempted premeditated murder as to Acosta who was standing next to Lopez when shots were fired. Because Lopez was in the same kill zone arguably described by the instruction, and there is no evidence defendant intended to kill his fellow gang member,

there is insufficient evidence, defendant argues, he intended to kill a "targeted individual *by killing everyone in the area in which the targeted individual was located*." (*People v. McCloud*, *supra*, 211 Cal.App.4th at p. 798 [defendant "*specifically intends* that *everyone* in the kill zone die"]; accord, *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1244 ["before a defendant may be convicted of attempted murder under a kill zone theory, the evidence must establish that all the victims were actually in the kill zone"].) This argument might have some traction but for the jury deadlocking on the attempted premeditated murder charge as to Acosta. The trial court declared a mistrial as to that charge and subsequently dismissed it. (Cf. *People v. Brogna* (1988) 202 Cal.App.3d 700, 710 [no prejudice from error in admitted evidence where defendant acquitted of crime to which it related].) Thus, at least part of the jury agreed with defense counsel's argument that defendant could not be convicted of the attempted murder of Acosta under a "kill zone" theory of attempted murder. If there was any error in the instruction, in extending the zone to the area where Acosta and Lopez were standing, such error was harmless because the jury did not find defendant guilty of trying to kill Acosta. That the jury deadlocked as to Acosta also supports our conclusion the jury properly understood from the instruction it could view the kill zone narrowly to encompass only that area immediately surrounding Ordonez.

Accordingly, because we find the instruction was properly given as to the count of attempted premeditated murder of Baquiax, we affirm the jury's conviction on that charge.

B. *Prior Strike Conviction*

Defendant contends, and the People agree, the trial court failed to find true the prior strike conviction allegation, requiring that defendant's sentence under the three strikes law be reversed and the matter remanded for resentencing.

The information alleged that defendant had a prior strike conviction. On defendant's motion, trial of the prior conviction allegation was bifurcated. Defendant waived a jury trial as to the allegation. When the trial court was setting a date for the sentencing hearing, defendant's counsel indicated that defendant was going to admit the prior conviction, so a court trial could be unnecessary. At the sentencing hearing, the trial court denied the defense's motion to strike the prior conviction, the defense waived arraignment for judgment and sentence, and the trial court sentenced defendant. It neglected to have defendant admit the prior conviction allegation or for the court to find the allegation true.

Defendant was entitled to a trial as to the prior conviction allegation. (Pen. Code, § 1025; *People v. Cross* (2015) 61 Cal.4th 164, 172.) It is therefore appropriate that we reverse defendant's sentence with directions to make a determination as to the truth of the prior conviction allegation and to resentence defendant accordingly. (*People v. Walker* (2001) 89 Cal.App.4th 380, 387-388.)[5]

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[5] The People point out, and defendant acknowledges, the trial court erroneously failed to impose a parole revocation fine pursuant to Penal Code section 1202.45 at the time it imposed a restitution fine under section 1202.4. (*People v. Tillman* (2000) 22 Cal.4th 300, 301-302.) On resentencing, the trial court should correct this error.

DISPOSITION

The judgment of conviction is affirmed. The sentence is reversed and the matter is remanded for resentencing in a manner consistent with this opinion.

KEENY, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.